No. 10708

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. J. REYNOLDS TOBACCO COMPANY and L. R. DONNELLY, Appellants,

vs.

GEORGE H. NEWBY, in his own behalf, RICHARD ARLEN NEWBY and PATTY ANN NEWBY, both minors, by their Guardian ad litem, George H. Newby, Appellees.

BRIEF OF APPELLEES

On Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

GLENN A. COUGHLAN,
Residence: Montpelier, Idaho.

B. W. DAVIS,
Residence: Pocatello, Idaho,
Attorneys for Appellees.

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APPELLEES' STATEMENT OF CASE

Counsel for Appellees feel that a further statement of the case will be of assistance in presenting a clearer picture of the controversy.

Appellants' statement of the pleadings and the nature of the action are not controverted.

Naturally some of the facts are in dispute and the facts herein referred to are facts that are supported

by evidence that the jury was entitled to believe if they desired.

One of the defendants, Rulon D. Hair, who was the driver of the truck at the time of the unfortunate death of young Mrs. Newby, had some time previously, while in the employ of the Reynolds Tobacco Co., and while under the direct supervision of L. R. Donnelly, while hauling a guest and acting contrary to instructions when using a panel truck belonging to Donnelly and the Tobacco Company, killed one Jacob Myers in the City of Pocatello on the morning of April 15, 1939 in the early morning hours of that date. Testimony of officers Smullen and Buskirk (R) 222 to 235. As a result of this accident, and unfortunate killing, the same defendants were sued in an action instituted as a result of the claimed negligence of Mr. Hair. Also, Mr. Hair was convicted of involuntary manslaughter for the death of Myers in Pocatello. Mr. L. R. Donnelly came to Pocatello for the purpose of investigating the accident in which Myers lost his life and at that time sent newspaper clippings back to Mr. Darr, an officer of the Reynolds Tobacco Company and also corresponded with Mr. Darr and Mr. Roe by telegraph and by letter. Later, Mr. Donnelly was present at and attended the trial of the case in District Court when Mr. Hair was convicted. Mr. Donnelly sent a full report to E. A. Darr (R) 255, in which he enclosed a newspaper clipping of the accident and stated that the clipping was all wrong in playing up the accident. He gave his version of the accident but did not report to the company that Mr. Eckersley was a guest in the panel truck at the time, or that Hair had been at the El Rio Night Club with the truck.

Mr. Roe, by telegraph, communicated with Mr. Darr, advising that Hair was out on bond and because of his sales ability, Donnelly regretted to lose him. (R) 261. Mr. Darr confirmed Mr. Roe's telegram and wired him as follows:

> "Since Hair was using the company car on personal business our disposition is to get his resignation. However, willing approve your recommendation as to continuing him provided he agrees to pay full cost of repairs to company car." (R) 261.

After discussing the matter with Hair, Mr. Donnelly continued to permit him to work for the company and to operate their truck, warning him that he must not again violate instructions. Within a very short time, namely on July 22, 1939, Hair, under the name of B. R. Hair, pleaded guilty to reckless driving in Dubois, Clark County, Idaho and was fined $50.00. At the time he was driving a panel truck belonging to the Reynolds Tobacco Co., and was operating in his territory. Thereafter, according to Mr. Hair's testimony, he violated the instructions of the company several times in hauling guests and later on, hauling Avenell Newby and she was also killed. The only testimony as to the circumstances of the hauling of Avenell Newby naturally is the testimony of Hair. However, Hair freely admitted that he had made statements that were not the fact that he had failed to tell the company the truth; that he first signed a report that he was on company business when Avenell Newby was killed and that he had no passengers. He then signed a corrected report stating that he was on company business but had a

passenger. Both of the reports are in evidence and are referred to in the deposition of Mr. Darr. (R) 268, Exhibit 12-13.

At the time of the injury to Avenell Newby, Mr. Donnelly had hurried to Montpelier, Idaho to investigate the accident and to take charge of the truck and the contents of the same. At that time he had a conversation with George H. Newby, the plaintiff, in which Mr. Donnelly told him that he had gotten Mr. Hair out of these scrapes before and that there would be no reason to bring suit against Hair. (R) 177. Also, that he, Donnelly, had talked to Hair and that it was just an innocent ride. (R) 177. At about the same time, Mr. Donnelly had a conversation with Russell and Calvin Teuscher, brothers of Avenell Newby. He said to Hair in the presence of Russell Teuscher:

> "Good God, did you have a woman with you again, I didn't know that." (R) 237.

Also, he told Russell Teuscher,

> "That he had trouble with this young man before." (R) 238.

In a conversation with Calvin Teuscher, Mr. Donnelly stated:

> "For God's sakes, were you with another woman?" (R) 243.

Also, he told Calvin Teuscher,

> "That he had warned Hair before." (R) 244-245.

The evidence as to the accident is contained in the testimony of the witness, Mike Maguire, Mr. Bunderston, the sheriff of Bear Lake County, Idaho, and Mr. Hair himself. Mike Maguire, an assistant road master for the Union Pacific Railroad Company, testified that the truck driven by Hair passed him some eight or ten miles before the accident, going at a speed of around 60 miles per hour; that as he proceeded on down the road, he came to the scene of the accident and that when asking Mr. Hair as to the cause Hair stated:

> "He said he just was drinking and driving too fast." (R) 101.

This witness' testimony was positively to the effect that he never met a motor vehicle of any kind or description from the time Hair passed him with the panel truck until he came to the scene of the accident. Mr. Hair's explanation of the accident was that a truck going in the opposite direction, and which would have been bound to meet Mr. Maguire, had forced him off the road.

The testimony of Mr. Bunderston, the sheriff (R) 112 to 158, recites in detail the measurement of the tracks of the company truck, the condition of the road bed and surrounding conditions. The truck tipped over on a straight stretch of road where there were no obstructions to the view either way from where the accident happened, for at least one-fourth of a mile. Measurements were made with a steel tape and a diagram made by the sheriff at the time, and showed that the tracks of the truck driven by Hair left the oiled high-

way on the west side, staying off for 117 feet; that they then stayed off the oil on the east side of the road 166 feet; that they then came back on the oil and went across it again for 146 feet; that they then took off the oil again for 66 feet and then went east across the oil 92 feet to the east side of the barrow pit and from there went 124 feet before it stopped and turned over. (R) 115. The car travelled 888 feet, or 296 yards, from the time it first left the oiled highway.

The testimony of Mr. Hair is to the effect that he was forced off the road by a large truck; that upon being forced off, the right front tire struck a rock causing a blow out and that his course from that time on was caused by reason of the blow out, which occurred at a time when he was going approximately 35 miles per hour. The tire on the truck never came off; the picture of the truck taken, shows all four tires on it. There was a blow out of this tire with a small slit and some of the rubber from the tube sticking out.

Mr. Oxenbine, a witness for the defendant (R) 334-338, an automobile mechanic, testified that the tire was mounted on a drop center rim and that the tire would not stay on the rim very long if the car was swerving badly.

Mr. Donnelly denied the testimony of Mr. Newby and the Teuscher boys, that he made the statements concerning his knowledge of Hair's prior acts. Hair denied any reckless driving whatever, claimed to be a competent and experienced driver.

Mr. Hair was uncorroborated in his statement concerning the length of time that Avenell Newby was with him.

SUMMARY OF APPELLEES' POSITION

While numerous technical objections were made to the pleadings, the introduction of evidence, the instructions and to almost every step that the appellees took, nevertheless, the case does not present any extraordinary complicated law questions or any serious question as to the main facts.

The appellees recognized and proceeded at all times upon the theory that they were bound by the guest statute of the State of Idaho; that it was necessary to prove that at the time of the accident, Hair was acting with a reckless disregard for the rights and life of Avenell Newby, as defined by the guest statute and by the Supreme Court of the State of Idaho. The appellees recognized and now recognize that it was incumbent upon them to prove that Hair was acting in the scope of his authority upon company business and that either the company consented to his hauling guests or that the company had such knowledge of his previous acts and record that they were bound by such acts and record and that it was necessary for the appellees to either introduce direct evidence upon these matters or such evidence as would justify reasonable men to find that either the appellants knew that Hair was a reckless incompetent driver and that he hauled guests or that they could have so known by the use of reasonable and ordinary diligence.

The case does not present any element of simple negligence as distinguished from reckless disregard or gross negligence. The plaintiff never contended that the proof of former acts of Hair's or proof of the knowledge of those acts by the appellants, was sufficient to entitle appellees to a verdict or that they could recover against anyone unless Hair, at the time of the accident, was acting with a reckless disregard of the rights of the deceased.

Appellants complain that evidence of the former acts of Hair were prejudicial and that not being admissible as to Hair and the Court having so ruled, that this evidence should have been excluded altogether. This argument is merely confusing. In any case where the master is joined with the servant, it takes evidence that would not be admissible against the servant alone, to prove the agency and that the servant is acting in the course of his employment in order to hold the master. If the present action was against Mr. Hair, the servant alone, the appellees would not be entitled to put in proof that the truck that Hair had, contained products of the Reynolds Tobacco Co.; that it was customary for Hair to sell those products; that the name of the Reynolds Tobacco Co. was painted on the car or that he was in the territory that he ordinarily sells goods in, because as to Hair, that makes no difference and could make no difference to the appellees and the evidence would be inadmissible. However, as to the master, if the negligence of Hair, or his careless conduct is proven, the evidence becomes admissible to show whether or not he was acting in the scope of his authority. The same situation arises when it is

sought to show that the master knew that the servant was a reckless and incompetent driver. The evidence as to his recklessness and incompetence is admissible on exactly the same theory as the evidence to show that he was acting within the scope of his employment when of course, Hair's liability does not depend at all on whether he was within the scope of his employment or whether he was a reckless driver. However, if the master knew he customarily acted as he did and that he acted within the scope of his authority, then the master is liable. Also, if the master knew he was a reckless incompetent driver, then the master and Hair should stand in the same shoes, and it is not necessary to prove that Hair was acting within the scope of his authority, because the master waived that proof when he permitted a reckless incompetent driver to operate the car.

The killing of a person is a serious and lamentable thing. The defendants take the position that the Myers incident, as they refer to it, was not sufficient to put the appellants on their guard and was not sufficient to advise them Hair was reckless or that he hauled guests contrary to instructions. The District Manager, Mr. Donnelly, took the position at the time that the newspapers in reporting the incident, and the police in arresting Hair and in holding his truck, were acting in an unwarranted manner. He thought Mr. Hair was too good a salesman to lose and he and Mr. Roe convinced the treasurer of the company, Mr. Darr, that they should allow Hair to continue and thereafter in July of the same year, when Hair had a woman as a guest, the woman not being his wife, in Clark County,

Idaho, a place within his own territory and a place under the direct supervision of Donnelly, he pleaded guilty to reckless driving while driving a company truck. This was before his trial. True, he gave his initials as B. R. Hair, but certainly the appellants having known of his using the truck to visit night clubs and of hauling Mr. Eckersley at the time he killed Meyers, were under some obligation to ascertain whether or not he was complying with their instructions. If appellants' position is correct an employer or owner of an automobile can shut his eyes to any course of action that his driver may follow and unless he is told explicitly and directly of specific acts of negligence, he cannot be charged with any responsibility whatever.

The appellants placed Hair in the exclusive control of the panel truck. Appellees take the position that the rule of law with reference to the liability of the owner of a motor vehicle is more strict where it is placed in the exclusive control of the servant than otherwise, and also take the position that it is the duty of concerns such as the Reynolds Tobacco Co. to employ competent, careful, law abiding drivers. They are not permitted to absolutely ignore the facts in connection with their drivers. The treasurer of the company, Mr. Darr, testified he had never seen Hair and that was undoubtedly the reason for appointing a District Manager to supervise these drivers.

Then the Reynolds Tobacco Co. had been sued in a civil suit for Hair's recklessness and when they knew that he had been convicted, it does not seem they could consider these facts as incidents of so little importance

that it was not necessary for Mr. Donnelly, who had charge of Hair's territory, to follow the matter up. They preferred to take their chances on Mr. Hair, and unfortunately it resulted in another death.

ARGUMENT

Appellees in their argument, will discuss the facts and the law deemed applicable under the following heads:

I. Does the complaint state a cause of action and was it subject to the motions of appellants?

II. The facts are sufficient to support the verdict.

III. A master who retains in his employ, a reckless or incompetent driver, is liable for the recklessness or incompetency of said driver. Likewise, a master who permits a driver to haul guests contrary to instructions, cannot claim lack of knowledge, or violation of instructions.

IV. Instructions to the jury.

I.

DOES THE COMPLAINT STATE A CAUSE OF ACTION AND WAS IT SUBJECT TO THE MOTIONS OF APPELLANTS?

The complaint stated a cause of action under the rules of Federal Procedure for District Courts and the appellants and Hair were in possession of all the facts with reference to the driving, with reference to the

ownership of the car and with reference to the circumstances. The testimony indicated clearly they were not surprised in any respect. Mr. Darr's deposition was taken at their instance; his cross examination indicated clearly the theory of the appellees; interrogatories were submitted by both sides and the appellants were not injured by the amendment of the complaint but were fully advised as to what appellees contended.

Manion v. Waybright, 59 Ida. 634, 86 Pac. 2d 181;

Dawson v. Salt Lake Hardware Co., (Ida.) 136 Pac. 2d 733;

Hollander vs Davis 120 Fed. 2d 131;

Sierocinski v. E. I. DuPont deNemours Co., 103 Fed. 2d 843;

Hardin v. Interstate Motor Freight System, 26 Fed. Supp. 97;

Department of Water & Power of the City of Los Angeles v. Anderson, 95 Fed. 2d 577;

Thayer v. Reindl, 1 F.R.D. 528;

George v. Stanfield, 33 Fed. Supp. 486;

Rocca v. Steinmetz et al, 214 Pac. 258;

Mitchell v. Churches, 206 Pac. 8;

Lutfy v. Lockhart, 295 Pac. 976;

Southern Pacific v. Hetzer, 135 Fed. 276.

Rule 8a (Subdivision 2), Rules of Civil Procedure for the District Courts of the United States, is as follows:

> "A pleading which sets forth a claim for relief, whether an original claim * * * which contains a short and plain statement of the claim, showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled."

Rule 15 of the Rules of Civil Procedure for the District Courts of the United States (Subdivision a), dealing with amendment by leave of Court is as follows:

> "Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Complaint is made that the appellees were not required to elect. This is certainly not a very serious objection. There was never any question of simple negligence in the case and appellant does not attempt to define simple negligence. Federal Courts have given up trying to distinguish between degrees of negligence. However, regardless of degrees of negligence, the jury was only instructed under the guest statute and on the question of a reckless disregard as provided by the statute.

Appellants insist that there is something peculiar about the Idaho guest statute and that the amendment of the statute deleting the words "gross negligence" requires some special form of pleading and that the

rule of law laid down by the Idaho Supreme Court in the case of Manion v. Waybright supra, has been abrogated by the amendment. That the Idaho Courts do not support appellants' view is shown by the language of the Court in Dawson v. Salt Lake Hardware Company, supra, the Court saying:

> "Where, however, the word is used with reference to the driver of a guest car, in relation to the guest himself in the car, it can hardly be said that 'reckless' includes **wilful, intentional** or **done on purpose.** If so intended, there would have been no reason for retention of the word 'reckless'; nor would the legislature have deleted from the statute the words, 'gross negligence' by the 1939 amendment. (Sec. 48-901, I,C,A. as amended, '39 S.L., Chap. 160, P. 286.) It is evident, to my mind, that the legislature by the use of the word 'reckless' following the word 'intentional' meant to hold the driver liable for a lesser degree of negligence than an 'intentional' act. A driver may accomplish the same result, however, by driving in a **manner** or at a **speed** that is dangerous (reckless), and yet do so with no special purpose to injury his guest or himself, or intent other than to be going wherever and however he pleases, regardless of results. The word 'reckless,' as used in this statute (Sec. 48-901, I.C.A., as amended by Chap. 160 of the '39 Sess. Laws), is, in my opinion, not used as synonymous with 'conscious indifference,' 'wilful disregard,' or 'wanton disregard' of the rights of a guest. Ordway, on Synonyms and Antonyms, gives the synonyms and antonyms of the word 'reckless' as follows:
>
> > **'Mindless,** negligent, **thoughtless, regardless, unconcerned, inattentive,** remis, improvident, rash, inconsiderate.

> 'Ant. Circumspect, careful, wary, **thoughtful, mindful, attentive, considerate,** provident, prudent, **calculating.'** (Boldface inserted.)

> "It will be observed that none of the foregoing carries the thought of reckless necessarily being intentional or purposely; but each rather conveys the idea of being the contrary, without thought or care for consequences, as indicated by the antonyms enumerated."

How can it be said that a couse of action could have been stated under the guest statute against Waybright, the owner and defendant in the Waybright case, for gross negligence, and that a cause of action could not have been stated against him for a reckless disregard for the rights of others.

It is settled that the Federal Court is bound by the law of Idaho and that it will follow the substantive law of the State in which the accident occurred. Consequently the Waybright case, being the law of Idaho, it is applicable in its construction of the guest statute. What difference can it possibly make that the statute has been amended by inserting "reckless disregard" instead of "gross negligence"? The contention is answered in Dawson et al v. Salt Lake Hardware Co., supra.

The appellants object that the complaint did not charge directly that Hair was a reckless driver and that they were prejudiced thereby. In other words, the objection is that the complaint does not allege that Hair was a careless, reckless and incompetent driver

and the defendants knew it, but they say that the complaint alleges, which it does, that the appellants knew that Hair was a careless, reckless and incompetent driver. All this is a bandying of words. The complaint actually alleges that Hair had the permission and authority of the defendants to use and operate the truck upon the highways, notwithstanding that at all of said times, the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions. Certainly the allegation that the appellants knew Hair was in the habit of hauling guests contrary to instructions is concise and plain enough for the Court and the litigants to understand.

II.

THE FACTS ARE SUFFICIENT TO SUPPORT THE VERDICT.

It is argued on appeal that the facts are not sufficient to support a verdict under the guest statute where it is necessary for the appellees to prove that the driver of the car acted with a reckless disregard for the right of the guest. That the jury was justified in finding that the driver so acted is amply supported by the record. The evidence clearly supports the verdict. The testimony of the witness Maguire that he did not meet any semi-trailer or any other motor vehicle from the time Hair passed him until he, Maguire, came to the scene of the accident, left it to the jury to believe or disbelieve Hair's story of being forced from the road and blowing out a tire.

Furthermore, when Mr. Hair reported the accident to Durwood Perkins, the appellants' witness (R) 358, he did not give any history of having been crowded off the road by a truck and semi-trailer, but made the following statement:

> "A. I did not know there had been an accident. Mr. Hair told me himself he had rolled his truck over; I did not know at the time Avenell Newby was with him, but he told me himself that he rolled his truck over."

Mr. Bunderston's testimony was to the effect that Hair did not tell him of any semi-trailer crowding him from the road and that he did not find any rock that Hair struck, such as was likely to blow a tire. An intimation was made by questions of the appellants' counsel, that there might be side roads where this truck could have left the highway and avoided meeting Mr. Maguire who was following closely behind. The jury had a right to take into consideration its own knowledge, if it had any, of the road in the vicinity and also the probability or likelihood of this large semi-trailer having pulled onto a side road when the shoulders of the road were muddy, without leaving such tell-tale marks that it would have been easy for the appellants to have offered direct proof. In addition, the members of the jury, some of whom lived in the immediate vicinity, could not have helped but know the general character of the country on each side of this road between Soda Springs and Montpelier and between the points where Hair could have been forced from the road and where Maguire's automobile would have been bound to be and they were entirely justified in disbelieving Hair's

story if it was not impressive.

Some credit must be given to the jurors for knowledge as to distances between Soda Springs and Montpelier; Soda Springs and Grace; Pocatello and Dubois, and the road conditions and whether or not there are any side roads in the immediate vicinity of where the accident happened. An examination of the jurors on their voir dire showed that one juror, Mrs. Kelly lived in Soda Springs; one juror, Mr. Creer, an old time resident, lived near Soda Springs; that the jurors, Garretson and Robinett lived at Dubois in Clark County.

The jury also as practical individuals were entitled to consider the time it would have taken the truck that crowded Hair from the road, to meet Mr. Maguire. Also, the longer time it took Mr. Maguire to arrive at the scene of the accident, the greater must have been the speed of the driver, Hair.

The measurements taken by the sheriff showing the course of the car and the distance it travelled, justifies any person of ordinary knowledge of automobiles and driving, in believing that the truck driven at a tremendous speed, went out of control and careened back and forth across the highway until it left the road. Certainly a truck going 35 miles per hour should not travel 300 yards before it is brought under control. Mr. Hair's description of the blown out tire, the size of the cut in it, and its general appearance, belies any claim that it could have blown out when he first left the oil surface of the road. A drop center tire carrying a load such as this truck carried, not only would not

have stayed on the wheel for 300 yards, but it would have been literally torn to shreds. The jury was justified in believing that the tire blew out when it finally hit the barrow pit and turned over. Certainly under the instructions of the Court, Mr. Hair's testimony, where it was not corroborated, was entitled to be scrutinized and even disbelieved by the jury if it was not convincing. The jury had an opportunity to see the different witnesses. Mr. Maguire and Mr. Bunderston were certainly entirely unprejudiced and unimpeached. The witness Hair, did not deny the statement attributed to him by the witness Maguire.

In the case of George v. Stanfield, 33 Fed. Supp. 486, Judge Cavanah, District Judge for Idaho, in construing the Oregon Automobile Guest statute, said:

> "The operation of an automobile at excessive speed without regard for the rights of others, when approaching a short curve upon a slippery highway, without brakes, is recklessness within the Oregon Automobile Guest Statute."

The Oregon code is identical with the present Idaho guest statute with reference to reckless disregard of the rights of others.

> "The physical facts, however, speak more forcibly than the words of the witness. There is no dispute or explanation of the positive testimony that defendant's car skidded 120 feet on the dry, concrete pavement, and 20 feet further on the gravel shoulder and collided with plaintiff's car with sufficient momentum to cause the damage complained of. There is no evidence in the record as to the speed indicated by such a situation, but

> we think it is a matter of common, if not universal, knowledge that it discloses a rate far in excess of 40 miles per hour, and that a jury would be justified in so concluding. In fact, under the circumstances of the instant case, we are of the view that the jury might well have concluded that defendant's speed was such as to be dangerous and reckless. In this connection it is pertinent to observe that according to the defendant's testimony, he travelled continuously on the east side of the concrete without seeing or passing another car. The record discloses, however, to a certainty we think, that he passed the Werner car a short distance south of the intersection. We conclude that the finding of negligent speed is amply supported. Meissner v. Papas, 124 F. 2d 723";
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> Brock v. Waldron, 14 A. 2d 715;
>
> Lionetti v. Coppola, (Conn.) 161 Atl. 797;
>
> Bordonaro v. Senk, (Conn.) 147 Atl. 136;
>
> See also notes in 92 A.L.R. 1367; 96 A.L.R. 1479; 86 A.L.R. 1145.

It was not necessary for the appellees to prove an intentional act on the part of Hair or that he was wanton and wilful. In Mescher v. Brogon, (Ia.) 227 N.W. 645, the Iowa statute is very similar to Idaho and the citation is also in point as to the case being one for the jury. See Cleveland C.C. & St. L. Ry. Co. v. Loret, 68 Fed. 823. The case of Dawson et al v. Salt Lake Hardware Co., supra, is ample authority for the contention that the question of whether the driver acted with a reckless disregard in the instant case was one to be determined by the jury and it is not believed

that it would be helpful in the presentation of this matter to cite the numerous authorities in automobile cases holding that the question of negligence where the mind of reasonable men may differ, is for the jury.

Appellants overlook the fact that while one may be negligent without being reckless, nevertheless, one who is reckless is bound to be negligent.

The Federal Courts do not attempt to draw distinction between degrees of negligence as the State Courts have attempted to do.

N.Y.C.R.R. Co. v. Lockwood, 17 Wall. 357, 382, 21 L. Ed. 627;

Connelly v. So. Pac. Ry. Co., 111 Pac. 2d 463;

The question of whether or not Hair was on company business and whether or not Donnelly and the Reynolds Tobacco Co. had knowledge that he was in the habit of hauling guests or was a reckless driver, was for the jury.

As appellees view the matter, there is ample evidence to support the verdict regardless of the question of whether or not the appellants knew he was a reckless driver. Exhibits 12 and 13, (R) 203 are reports made on blanks furnished by the company to be filled in when the drivers have accidents. Exhibit 12 stated in answer to question 15 thereon, that Hair was on company business. He then made a corrected report in which he made exactly the same answer to the same question. The testimony of Mr. Donnelly (R) 202, was

that he either inspected Exhibits 12 and 13 or at least one of them:

"Q. Did you see Mr. Hair make them out?

"A. I saw him make one copy.

"Q. You looked them over when he made them out?

"A. I looked it over I guess.

"Q. Where did you see him make it out?

"A. In the Chief of Police Office at Montpelier, Idaho, as I recall it."

Mr. Donnelly's report to his superior, Mr. Darr at the time of the injury of Avenell Newby, stated:

> "A married woman passenger whom Mr. Hair had picked up was severely injured and was in need of immediate medical attention." (R) 267.

Mr. Donnelly told the witness Newby:

> "That he had talked to Mr. Hair and he said as far as he could tell, it was just an innocent ride." (R) 177.

Mr. Hair was in his territory during business hours and was hauling the products of his company in the customary manner and regardless of whether his employer knew he was a reckless driver, the jury was justified in believing he was on company business. The appellees do not believe Mr. Hair's story that Mrs. Newby had been with him all night. Such a statement is absolutely unsupported by any evidence except of Hair. He certainly told Donnelly it was an innocent

ride and the testimony was for the jury on this phase of the matter.

III.

A MASTER WHO RETAINS IN HIS EMPLOY, A RECKLESS OR INCOMPETENT DRIVER, IS LIABLE FOR THE RECKLESSNESS OR INCOMPETENCY OF SAID DRIVER. LIKEWISE, A MASTER WHO PERMITS A DRIVER TO HAUL GUESTS CONTRARY TO INSTRUCTIONS, CANNOT CLAIM LACK OF KNOWLEDGE OR VIOLATION OF INSTRUCTIONS.

Mr. Donnelly was the District Manager and according to Mr. Darr's testimony, in full charge of Hair and the man to whom Hair made his report. There was ample evidence to justify the jury in believing that Mr. Donnelly knew of Mr. Hair violating company instructions with reference to hauling guests and also that by the use of ordinary diligence, he could easily have been advised of repeated violations of company instructions. It appears clearly from the record in Mr. Donnelly's report to his superiors, that he was trying to shield Hair. In Mr. Donnelly's report of the accident at Pocatello, in which Mr. Myers was killed, after investigating the accident, after being in the town where the police officers were, and calling on them (R) 204; after Hair was arrested and out on bond and when he could not have but known that Mr. Hair was not returning from taking his wife to the depot when he struck Myers. He, nevertheless, reported to Mr. Darr to the effect that Mr. Hair did not have a passenger contrary to instructions and that Hair was

returning from the train. The facts show that Mr. Eckersley was in the truck with Mr. Hair; that he was not returning from the train, but that he had been to the El Rio Night Club and that he was under the influence of liquor at the time he struck Myers. Also that he was driving recklessly and Mr. Donnelly testified that the jury recommended leniency for Mr. Hair.

Of course, Mr. Donnelly is bound by what he knew and of course the Tobacco Company is likewise charged with the knowledge of the District Manager. This requires no argument.

Mr. Donnelly testifeid that he covered his territory in Idaho once a month; that he imagined that Hair had a good record in Clark County as a driver. That Clark County was in his territory and that he tried to keep advised as to whether or not Hair was obeying instructions with reference to hauling guests. (R) 210-211. Either Mr. Donnelly did not try to keep advised in Clark County as to Mr. Hair's actions or record, or if he did try, he was bound to have ascertained that Hair had a bad record in that county and that he had disobeyed instructions and the appellants, having admitted full knowledge of the facts surrounding the death of Myers; having admitted that Mr. Donnelly attended Hair's trial; having admitted that they knew Hair was violating their instructions and Mr. Darr having advised that he felt Hair should be discharged but that he was willing to follow Donnelly's advice, cannot say that appellants were not under the obligation of at least keeping in touch with Hair's activity and surely cannot say that they were not under the

obligation of finding out that while operating in his own territory with the company truck, that he pleaded guilty to reckless driving in the Probate Court on the complaint of the sheriff of the county and was fined $50.00. It is contended that Exhibit 22 was not admissible and that there was no notice to the appellants. Certainly the defendant Hair knew whether he was guilty of reckless driving and his own plea of guilty was as convincing as most anything could have been, of his recklessness. An investigation would have shown that at that time he had as a guest with him, a woman, not his wife. This is according to Mr. Hair's testimony.

The Courts hold that the master is liable for the retention or employment of an incompetent servant. In the first place, it is the duty of the master to employ competent servants to operate automobiles. In the second place, upon receiving information that a servant is incompetent, it is the duty of the employer to discharge the servant or to so circumscribe his activities that he will not injure others. This is especially true where his recklessness has resulted in the death of a person and where he has been convicted and where he has pleaded guilty to reckless driving.

> "In these circumstances, it seems to us the duty of the Courts to indulge no subtle reasoning in extending the doctrine of non-liability to the owner of such an instrumentality who, in his search of gain and profit, places one of these in irresponsible hands, but rather to require of him such supervision of his servants as will avoid disobedience to and disregard of his rules, or, failing so to do, when injury occurs to a stranger, to shoulder the responsibility. Hence we are of the

opinion that whatever may be the ruule in the case of a private chauffeur who, in violation of his master's orders, takes his private automobile and uses it without the master's knowledge and for the servant's purposes alone, or, in the case of one intrusted for the moment by its owner with an automobile for a specific purpose who, in disregard of that purpose, uses it for another, the rule in the case of one who, as a carrier of passengers for hire, places an automobile in the hands of a servant for the purpose of soliciting and obtaining fares and transporting them from one part of the city to another, and who, in such circumstances, admittedly would be liable to a pedestrian negligently injured by the servant, should reasonably be held to include liability for an injury inflicted by the negligence of the servant where that servant, in violating of the master's rules, is, as was here the case, transporting free a friend to her home near by. Schweinhaut v. Flaherty, 49 Fed. (2d) 535."

"The other question in the case calls for very little discussion. That question is whether the Court erred in submitting to the jury the issue as to the competency of Walter Wood, the driver of the truck in which appellee was being carried when he was injured. It is the duty of the master to use due care in the selection of competent servants. The retention of an incompetent servant after the master has had reasonable notice, either direct or constructive, of such incompetence, constitutes negligence on the part of the master; the master is chargeable with knowledge of the incompetency of the servant if by the exercise of due care he could have ascertained such incompetence. A master is liable for an injury received by an employee on the ground of negligence in employing or retaining an incompetent servant,

if such incompetency was the proximate cause of the injury." 39 C.J. Pps. 640, 641 pp. 533-535. Rainwater v. State, 120 So. 800.

"Employer in selecting employee, must exercise degree of care commensurate with nature and danger of business in which he is engaged and nature and grade of service for which servant is intended." 97 S.W. Rep. 2d 452. Wishbone v. Yellow Cab Co.

"In Raub v. Donn, 254 Pa. 203, 98 Atl. 861, the Supreme Court of Pennsylvania held that the Trial Court did not err in instructing the jury:

> 'It is the duty of a man to see that his automobile is not run by a careless, reckless person, but that it is in the hands of a skillful and competent person.' "

"In Gardner v. Solomon, 200 Ala. 115, 75 South, 623, L.R.A. 1917F, 380, it was declared that, while automobiles are not regarded as inherently dangerous instrumentalities, and the general rule is that the owner is not liable for the negligent use of the same by another, except upon the theory of respondeat superior, yet an exception exists when he knowingly intrusts it to one who is so incompetent as to convert it into a dangerous instrumentality. It also held therein that the allegation:

> 'That Thomas "was, and had long been, a careless, indifferent, heedless, and reckless driver of such car," was the equivalent of charging that he was incompetent." ' Rocca v. Steinmetz et al, 214 Pac. 259.

"In a case of a mere permissive use of an automobile, the liability of the owner should rest not only upon the fact of ownership, but upon the combined negligence of the owner and the driver; negligence of the owner in intrusting the machine to an incompetent driver, and of the driver in its operation." Mitchell et al v. Churches et al. 206 Pac. 6.

"A habit of negligence that is known, or that by the exercise of reasonable care would have been known, to a master, and notorious acts of negligence, such as those which cause collisions of trains and the **death of passengers,** may render a servant incompetent, and impose upon the master the duty of discharging him.

"Specific acts of negligence of which the master has notice are conceded to be admissible to prove incompetenct, and a general reputation for incompetence is admissible to show that the master, by the exercise of ordinary care, would have known of the incompetence of the servant."

Southern Pacific Co. v. Hetzer, 135 Fed. Rep. 276;

Keyser Canning Co. v. Kots Throwing Co., 31 A.L.R. 283.

Lutfy v. Lockhart, 296 Pac. 976.

The case of Department of Water and Power of the City of Los Angeles v. Anderson, 95 Fed. (2d) 577, 9th Circuit Court of Appeals, is directly in point on the employment of a reckless or incompetent driver.

The case of Manion v. Waybright (Ida.), supra, is directly in point on the hauling of guests by the employee.

Black v. Coffin, 126 Pac. (2) 871;

School District 26 v. Baxter County Board of Education, 35 S.W. (2d) 1013.

IV.

INSTRUCTIONS TO THE JURY

Appellants complain that the jury was not instructed on contributory negligence. It is true they pleaded contributory negligence and assumption of risk, but the question of contributory negligence was not presented by the facts and they were not entitled to an instruction as a matter of law.

Contributory negligence is not a defense to an action based upon reckless disregard or gross and wanton negligence. The Supreme Court of the State of Idaho in Dawson v. Salt Lake Hardware, supra, clearly recognized the rule of law that contributory negligence is not a defense under the guest statute but in that case the parties on both sides, having proceeded upon the theory that it was a defense and having asked instructions upon it, the Court did not hold that it was error to give the instructions.

Connecticut and Iowa have guest statutes so nearly identical with that of Idaho, that the rule of law as to contributory negligence as laid down by the Supreme Courts of those two states, is applicable.

Siesseger v. Puth, (Ia.) 239 N.W. 46;

Neessen v. Armstrong, (Ia.) 239 N.W. 56;

Shenkle v. Mains, (Ia.) 247 N.W. 635;

Lionetti v. Coppola, (Conn.) 161 Atl. 797;

Bordonaro v. Senk, (Conn.) 147 Atl. 136.

Contributory negligence is a defense to mere negligence, but the plaintiff must prove reckless disregard, which is more than mere negligence.

Regan v. Keating et al, 42 N.E. 122;

Miesmer v. Dillon, 42 N.E. 2d 305;

Universal Pipe Co. v. Bassett, 200 N.E. 843, 119 A.L.R. 646;

Barnes v. Collins, 32 N.E. 2d 626, 138 A.L.R. 1123;

Potter v. Gilmore, 184 N.E. 373, 87 A.L.R. 1462;

Cochrane v. M. & M. Transportation Co., 110 Fed. 2d 519;

Haacke v. Lease, 41 N.E. 2d 590;

Johnson v. City of Alcoa, 145 S.W. 2d 796.

There are some cases holding that where the plaintiff is guilty of the same degree or kind of negligence or carelessness as the defendant is, that plaintiff cannot recover. However, the appellees in the instant

case did not charge Hair with negligent driving; they charged him with a reckless disregard for the rights of others and bottomed their case upon the guest statute. In order for the appellees to avail themselves of assumption of risk or any such doctrine, it would have been necessary for them to have proven that Avenell Newby was guilty of exactly the same kind of reckless disregard and that her injury was either intentional, caused by intoxication or by reckless disregard.

In 38 A.L.R., Page 1424, the question is annotated.

It seems to be settled by the weight of authority that gross negligence or reckless disregard for the rights of others in automobile accidents precludes the defense of contributory negligence.

The appellants did not produce any proof that Avenell Newby was guilty of contributory negligence or that she was intoxicated.

Error is predicated upon the refusal of the Court to instruct the jury in a separate instruction that the testimony of Sid Close should not be considered. Specification of Error 28. The Court had already instructed the jury:

> "You should not consider any evidence offered by either side and rejected by the Court, nor should you consider any evidence ordered stricken from the record." (R) 375.

Furthermore, the appellants cannot object or complain of evidence stricken in support of their objection or motions.

McCoy v. Krengel, 52 Ida. 626, 17 Pac. 2d 547.

Error is also predicated upon the Court giving an instruction with reference to the law of the State of Idaho as to the general duties of one driving a motor vehicle upon the highway. (R) 369. Specification of Error 17. This instruction could not have been confusing to the jury and the jury was specifically instructed that the appellees must recover under the guest statute and the guest statute was quoted and defined. (R) 367. However, the jury was entitled to know the law as to the rules of the road in Idaho on the question whether or not the driver was violating the law in order to assist them in determining whether he acted recklessly. The Court would undoubtedly also have been justified in instructing the jury that the President of the United States had requested drivers of automobiles not to drive their vehicles over thirty-five miles per hour. At least, not to drive them sixty miles per hour.

All that any litigant is entitled to, is that his theory of the case be intelligently submitted to the jury. No two jurists use exactly the same language in defining a legal proposition. The instructions are not subject to the criticisms that men of ordinary intelligence could not readily understand them under the evidence. The Court made it very plain that Hair's former recklessness was not proof of his recklessness in the instant case and also made it clear that this former recklessness and evidence of hauling guests was not to be considered against the appellants unless they found from the evidence, first: that he was careless, reckless and

incompetent; and second: that the appellants either knew this or could by reasonable diligence, have known.

"You are instructed that the plaintiffs have alleged **and** the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, were negligent in permitting Rulon D. Hair to use said automobile knowing him to be reckless (411) and incompetent driver. Before you can consider this charge against the said R. J. Reynolds Tobacco Company and L. R Donnelly, it would be necessary for you to find from a preponderance of the evidence, first: that Rulon D. Hair was a careless, reckless and incompetent driver; and, secondly: that such facts were known to the R. J. Reynolds Tobacco Company and L. R. Donnelly, and before such matter can be considered by you it would be necessary for you to find that a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent or employee should be sufficient to establish the master's negligence in retaining the servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless and incompetent driver, yet, if such was not known or by reasonable diligence could have been known to R. J. Reynolds Tobacco Company and L. R. Donnelly, they could not, nor either of them, be held negligent in employing Rulon D. Hair, or keeping him in their employment." (R) 367.

It is apparent that there is some error, typographical or otherwise, in the first line of the instruction. The word "and" was evidently intended to be "that," or the word "that" may have followed "and," and been omitted, but the jury could not have misunderstood this instruction and the instructions as a whole are such that they fairly presented the law to the jury and the appellants' rights were amply protected.

It it respectfully submitted that the judgment should be affirmed.

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